CCASE:
CONSOLIDATION COAL v. SOL (MSHA)
DDATE:
19810320
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

CONSOLIDATION COAL COMPANY, CONTESTANT	Notice of Contest
v.	Docket No. WEVA 80-160-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Citation No. 633821; November 26, 1979 Shoemaker Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. WEVA 80-379 A/O No. 46-01436-03083
v.	
CONSOLIDATION COAL COMPANY, RESPONDENT	Shoemaker Mine

DECISION

Appearances: David E. Street, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Mine Safety and Health Administration;
Ronald S. Cusano, Esq., Rose, Schmidt, Dixon, Hasley, Whyte & Hardesty, Pittsburgh, Pennsylvania, for Consolidation Coal Company.

Before: Judge Cook

I. Procedural Background

On December 26, 1979, Consolidation Coal Company (Consol) filed a notice of contest in Docket No. WEVA 80-160-R pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (Supp. III 1979) (1977 Mine Act) to contest Citation No. 633821. The citation was issued on November 26, 1979, pursuant to section 104(a) of the 1977 Mine Act citing Consol for an alleged violation of mandatory safety standard 30 C.F.R. 75.301. The citation contains the additional allegation that the cited violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. Consol's notice

of contest alleged, inter alia, (1) that the citation failed to cite a condition or practice which constituted a violation of mandatory safety standard 30 C.F.R. 75.301; and (2) that no conditions or practices existed in the mine which could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

An answer was filed by the Mine Safety and Health Administration (MSHA) on or around January 7, 1980. In its answer, MSHA (1) admitted the issuance of the citation and stated that it was properly issued pursuant to section 104(a) of the 1977 Mine Act; (2) stated that a violation of a mandatory standard occurred; and (3) denied all other allegations contained in the notice of contest. Additionally, MSHA requested a continuance pending the filing of the associated civil penalty case. The requested continuance was granted by an order issued on February 5, 1980.

On June 23, 1980, MSHA filed a proposal for a penalty in Docket No. WEVA 80-379 pursuant to section 110(a) of the 1977 Mine Act alleging violations of two provisions of the Code of Federal Regulations. The proposal for a penalty encompasses Citation No. 633821. Consol's answer was filed on July 9, 1980.

The hearing was held on July 22, 1980, in Washington, Pennsylvania, at which time evidence was presented in a consolidated proceeding addressing Citation No. 633821. (FN.1) Representatives of both parties were present and participated. Exhibit No. M-3 was reserved for the posthearing filing by MSHA of a computer printout setting forth Consol's history of previous violations at the Shoemaker Mine for which assessments have been paid during the 24 months preceding November 26, 1979. Following the presentation of the evidence, a schedule was set for the filing of posthearing briefs and proposed findings of fact and conclusions of law. However, the briefing schedule was subsequently revised at MSHA's request.

On August 21, 1980, Petitioner filed a computer printout in Docket No. WEVA 80-379 setting forth Consol's history of previous violations at the Shoemaker Mine for which assessments have been paid, beginning November 19, 1977, and ending November 18, 1979. The following stipulation was filed in conjunction therewith:

> The parties * * * stipulate that, for the purposes of this proceeding, the relevant portion of the attached

> computer printout, program ID: AS45904, is that portion pertaining to [Consol's] history of violations at the Shoemaker mine during the period November 19, 1977 to November 18, 1979. [MSHA] offers the attached printout in evidence as Exhibit M-3. [Consol] has no objection to reciept [sic] of the printout in evidence for the limited purpose set forth above.

Exhibit M-3 was received in evidence by an order issued on September 23, 1980.

Consol and MSHA filed posthearing briefs on September 26, 1980, and September 29, 1980, respectively. Consol filed a reply brief on October 10, 1980.

II. Violations Charged in Docket No. WEVA 80-379

Citation No.	Date	30 C.F.R. Standard
633657	11/19/79	75.303 (FN.2)
633821	11/26/79	75.301

III. Witnesses and Exhibits

A. Witnesses

MSHA called as its witness Federal mine inspector Charles Coffield.

Consol called as its witness Kit Phares, the regional inspector for the Moundsville Operations of Consol's Eastern Division.

B. Exhibits

1. MSHA introduced the following exhibits in evidence:

M-1 is a copy of Citation No. 633821, November 26, 1979, 30 C.F.R. 75.301, and a copy of the termination thereof.

M-2 is a copy of the Shoemaker Mine's approved ventilation system and methane and dust control plan in effect on November 26, 1979, and submitted for revision on May 9, 1980.

M-3 is a computer printout setting forth Consol's history of previous violations at the Shoemaker Mine for which assessments have been paid, beginning November 19, 1977, and ending November 18, 1979.

2. Consol introduced the following exhibits in evidence:

O-1 is a map of the 5 North Face section of the Shoemaker Mine.

O-2 is a copy of Inspector Coffield's "inspector's statement," MSHA Form 7000-4, pertaining to M-1.

IV. Issues

A. The following issues are presented in the above-captioned notice of contest proceeding:

1. Whether the condition or practice cited in Citation No. 633821 constitutes a violation of mandatory safety standard 30 C.F.R. 75.301.

2. If the condition or practice cited in Citation No. 633821 constitutes a violation of mandatory safety standard 30 C.F.R. 75.301, then whether such violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

B. Two basic issues are involved in the above-captioned civil penalty proceeding: (1) did a violation of the Code of Federal Regulations occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

1. The Administrative Law Judge has jurisdiction in the above-captioned proceedings (Tr. 5-7).

2. Consol operates in interstate commerce, and the Shoemaker Mine is covered under the 1977 Mine Act (Tr. 6-7).

3. Consol is a large operator, and the Shoemaker Mine is a large mine (Tr. 6-7). Specifically, the size of Consol is rated at 44,855,465 tons of coal per year, and the size of the Shoemaker Mine is rated at 1,791,721 tons of coal per year (Tr. 11).

4. Consol abated the violation within the time set by the inspector and it acted in good faith in doing so (Tr. 5-6).

B. Occurrence of Violation

Federal mine inspector Charles Coffield issued Citation No. 633821 at Consol's Shoemaker Mine during the course of his

November 26, 1979, inspection

(Tr. 15-16). The citation alleges a violation of mandatory safety standard 30 C.F.R. 75.301 in that only approximately 4,600 cubic feet of air per minute (cfm) was reaching the last open crosscut between the No. 2 and No. 3 entries of the Five North Face left side section (047) (Exh. M-1). The citation alleges a violation of that portion of mandatory safety standard 30 C.F.R. 75.301 which requires that "[t]he minimum quantity of air reaching the last open crosscut in any pair or set of developing entries and the last open crosscut in any pair or set of developing rooms shall be 9,000 cubic feet a minute." (See Tr. 61.)

The briefs filed by the parties present two questions for resolution in determining whether a violation occurred. The first question relates to the accuracy of the 4,600 cfm air volume measurement obtained by the inspector, and to the methods used by inspector to obtain that air volume measurement. The second question relates to whether the air volume measurement, as stated, constituted a violation of the law at the time and location involved.

The resolution of the first question turns upon Consol's challenge to the accuracy of the air velocity measurement used by the inspector in his computations to determine that only approximately 4,600 cfm of air was reaching the last open crosscut between the No. 2 and No. 3 entries of the Five North Face left side section. An anemometer was used to make the air velocity measurement. It appears from the record that an accurate air quantity computation, based upon an air velocity reading taken with an anemometer, requires the following: An approved, calibrated anemometer is used to obtain an air reading. An anemometer correction chart is then used to convert this reading into an accurate air velocity measurement. The width and the height of the crosscut are determined, and the three figures are multiplied together to obtain an air quantity measurement in terms of cfm.

Consol's challenge to the accuracy of the 4,600 cfm reading rests solely upon the assertion that Inspector Coffield could not state for certain whether he had or had not used the anemometer correction chart (Consol's Posthearing Brief, pp. 18-19; Consol's Reply Brief, p. 8). Inspector Coffield testified on direct examination during MSHA's case-in-chief: (1) that he used an approved, calibrated anemometer to take an air velocity reading; (2) that, to the best of his recollection, he obtained a reading of 38 feet per minute; (3) that he had already taken a width and a height measurement; and (4) that he multiplied the three figures together and obtained an air quantity figure of slightly less than 4,600 cfm (Tr. 16). Consol's position as to whether the inspector did or did not use the correction chart is based upon the following testimony elicited from Inspector Coffield on cross-examination during MSHA's rebuttal case:

> Q. Mr. Coffield, your anemometer that you used to take the readings, is it equipped with a correction chart?

A. Yes, sir.

Q. Did you use the correction chart for taking the readings on the date in question?

A. The correction chart, I think --

Q. The answer would be yes or no, I think, to that question.

A. I don't know if I can answer it yes or no. I will say I looked at -- yes, I looked at the correction chart.

Q. You looked at it?

A. Uh-huh.

(Tr. 96-97).

I find that the evidence is sufficient to support a finding that the inspector made use of the correction chart. The fact that he looked at the chart renders it more probable than not that he made use of the chart in computing air velocity. The record also contains sufficient independent evidence to corroborate the accuracy of the 4,600 cfm figure. Mr. Phares testified that Inspector Coffield performed a series of computations prior to stating that there was only 4,600 cfm reaching the last open crosscut between No. 2 and No. 3 entries (Tr. 73). Mr. Phares' position of the date of the inspection does not appear to have included any disagreement with the accuracy of the inspector's 4,600 cfm reading. It appears that the disagreement was confined to the location where the air velocity measurement was obtained, with Mr. Phares contending at the time that the reading should have been taken in the last open crosscut between No. 1 and No. 2 entries (Tr. 69-70). Mr. Phares made computations based on an air velocity reading taken in the last open crosscut between No. 1 and No. 2 entries and obtained a 26,000 cfm figure (Tr. 69-70). Considering the arrangement of the ventilation system, Mr. Phares did not consider the difference between his reading and Inspector Coffield's reading to be unusual (Tr. 75). Accordingly, I find that only approximately 4,600 cfm of air was reaching the last open crosscut between No. 2 and No. 3 entries.

Consol's challenge to the method of measurement centers around the smoke tube test performed by Inspector Coffield (Consol's Posthearing Brief, p. 19). Consol challenges the test on various grounds. However, the evidence establishes that the results of the smoke tube test did not form a basis for the inspector's determination that only approximately 4,600 cfm of air per minute was reaching the last open crosscut between No. 2 and No. 3 entries. The evidence clearly shows that the smoke tube test was performed after the inspector informed Mr. Phares that he had obtained a 4,600 cfm figure using the air velocity figure derived from the anemometer reading (Tr. 93-94). Accordingly, it is unnecessary to address Consol's challenge to the smoke tube test in order to resolve the issues presented herein.

The second question raised by the parties is whether an air volume measurement of 4,600 cfm at the location involved constituted a violation of 30 C.F.R. 75.301. The record establishes the following:

The Five North Face section of the Shoemaker Mine was a two miner section consisting of 10 entries numbered in sequence from left to right (Exh. O-1, Tr. 68-69). Each entry contained a "working face." The type of ventilation system in use was described as a split system of ventilation (Tr. 58-59). On November 26, 1979, the working face where coal was being extracted, on the left side of the Five North Face section, was located in the No. 1 entry (Tr. 68-69, Point A on Exh. O-1). The mining plan on the day shift was to advance the No. 1 entry a distance of approximately 100 to 120 feet (Tr. 68). None of the other entries on the left side of the Five North Face section were to be mined during the shift (Tr. 84). (FN.3) Ventilation was accomplished through the use of permanent stoppings, check curtains, regulators and a system of fans (Exh. O-1, Tr. 79, 87).

The ventilation system on the left side of the section was set up as follows: Permanent stoppings had been installed in the crosscuts between No. 2 and No. 3 entries, up to and including the second crosscut outby the last open crosscut (Exh. O-1). A check curtain (check curtain No. 1) had been installed in a crosscut between the No. 1 and No. 2 entries. The crosscut containing check curtain No. 1 was located one crosscut outby the last open crosscut (Exh. O-1). An additional check curtain (check curtain No. 2) had been installed in the No. 2 entry at a point approximately midway between the first crosscut outby the last open crosscut and the second crosscut outby the last open crosscut (Exh. O-1). Under this setup, the left side of the section was being ventilated with Nos. 3, 4 and 5 entries, and part of No. 2 entry, on intake air. The No. 1 entry and the remainder of No. 2 entry were on return air (Exh. O-1, Tr. 69). An auxiliary exhaust fan was located in the No. 1 entry just outby the point where it intersected with the last open crosscut (Exh. O-1, Tr. 79). According to Mr. Phares, the return air course began in the No. 1 entry at the last open crosscut (Tr. 69).

Check curtain No. 1 was loose in a few places around the edges, but it was basically up and basically sound (Tr. 29, 33-34). Check curtain No. 2 was almost completely torn down; specifically, approximately two-thirds of it had been torn down and approximately one-third of it remained up (Tr. 29, 31-33). (FN.4)

As noted above, Inspector Coffield measured the volume of air in the last open crosscut between No. 2 and No. 3 entries and obtained a measurement of 4,600 cfm. Mr. Phares promptly measured the volume of air in the last open crosscut between No. 1 and No. 2 entries and obtained a measurement of 26,000 cfm.

MSHA contends that Inspector Coffield took his measurements in the proper location, i.e., in the last open crosscut between No. 2 and No. 3 entries. MSHA points to the provisions of the approved ventilation system and methane and dust control plan in effect on November 26, 1979 (Exh. M-2), as designating the line of pillars between No. 2 and No. 3 entries as the line of pillars separating the intake and return air courses. Consol disagrees, contending that the measurements were required to be taken in the last open crosscut between No. 1 and No. 2 entries because, under the ventilation set up in use on November 26, 1979, the line of pillars between the No. 1 and No. 2 entries was the line of pillars separating the intake and return air courses. Consol maintains that the point at which intake air becomes return air is of significance in making this determination, and contends that intake air becomes return air only after it has passed over the last active working face. Accordingly, Consol argues that the return air course did not begin until the air had passed over the last active working face, in this case the face of the No. 1 entry where work was actually in progress.

Consol's position is not sustainable from two different standpoints.

First, its position can be maintained only if it relies upon the provisions of 30 C.F.R. 75.301-3(a). This section of the regulations was promulgated by the administrators of the 1969 Coal Act to set forth a place they considered adequate to measure the quantity of air which Congress determined was required to reach the last open crosscut. In enacting section 303(b) of the 1969 Coal Act, Congress decreed that the minimum quantity of air reaching the last open crosscut in any pair or set of developing entries shall be 9,000 cfm. Therefore, Congress determined that this quantity of air must reach the last open crosscut where it intersects each developing entry.

The regulation as to the place to measure the quantity of air states, in part, that "the volume of air shall be measured in the last open crosscut

through the line of pillars that separates the intake and return air courses of each split." 30 C.F.R. 75.301-3(a).

Consol argues that such place of measurement is the place where intake air becomes return air and that that place varies such that it occurs at that particular working face where mining is actually being done.

Consol, however, submitted a ventilation plan that was approved by the Government wherein it set forth a specific provision that permanent stoppings will be maintained to separate intake and return air courses up to and including the third connecting crosscut outby the faces. Exhibit O-1 shows the places where Consol installed its permanent stoppings. Consol itself then designated that line of stoppings as the separation between the intake air course and the return air course.

Consol can hardly now claim that it did not affirmatively determine, under its own ventilation plan, the separation between the intake and return air courses. This, of course, is between the No. 2 and No. 3 entries. Therefore, as a minimum, the air reading must be 9,000 cfm in the crosscut between No. 2 and No. 3 entries. (FN.5)

There is another reason why Consol's position is not well founded. As stated above, the statute in question requires that 9,000 cfm of air reach the last open crosscut where it intersects each developing entry.

We know that the quantity of air in the last open crosscut between the No. 2 and No. 3 entries was only 4,600 cfm. We also know that the witness for Consol stated that in his opinion the quantity of air in the last open crosscut between the No. 5 and No. 4 entries and the No. 4 and No. 3 entries was possibly less than 4,600 cfm (Tr. 88-89).

Therefore, Consol's position results in a situation wherein the air reaching the last open crosscut in No. 5, No. 4, and No. 3 entries could be less than 9,000 cfm and Consol would maintain that this was not a violation of law.

However, this condition would violate the basic intent of the statute since 9,000 cfm of air would not be reaching the last open crosscut where it intersects the No. 3, No. 4, and No. 5 entries. Each of these entries contains a working face. The term "working face" is defined as "any place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle." 30 C.F.R. 75.2(g)(1).

Methane is released from all of the working faces in the mining cycle even though coal is being extracted from only one of those faces at a given time (Tr. 34-37, 91-92). (FN.6) Therefore, air of that quantity is needed to maintain safe conditions in the entire mining cycle. This is why Congress requires that such quantity of air reach the last open crosscut where it intersects each of these developing entries.

The case of Zeigler Coal Company, 3 IBMA 78, 81, I.D. 173, 1973-1974 CCH OSHD par. 17,615 (1974), has been cited. In that case, the Interior Board of Mine Operations Appeals (Board) cited 30 C.F.R. 75.301-3 and indicated that the location at which the air volume measurement is to be made, which is through the line of pillars separating the intake and return air courses, must be determined with reference to the point at which intake air becomes return air. 3 IBMA 78 at 83-84. As stated above, in view of the definition of "working face", the faces in each entry were working faces. We know that intake air was proceeding up to the faces in the No. 5, No. 4, No. 3, and No. 2 entries.

When the intake air in No. 5 entry reached the No. 5 working face that air became return air since it would be carrying methane away from the face area (Tr. 34-39, 91-92) whether or not mining was being done at that moment in that particular working face in the mining cycle. That return air would then be drawn to the left of the section through the last open crosscut by the auxiliary fan in the No. 1 entry. Intake air was also coming up the No. 4 and No. 3 and No. 2 entries as shown on Exhibit O-1. We know that that air was intake air at least until it reached the last open crosscut and that it was return air as it proceeded to the left of each entry through the last open crosscut.

Consequently, the provisions of 30 C.F.R. 75.301-3 as to the place of air measurement can be applied in the last open crosscut between each entry since the air is continuously changing from intake to return air.

No matter what kinds of arguments are developed as to locations of measurements, (FN.7) it is patently clear that the finding of only 4,600 cfm as the measurement of quantity of air obtained in the last open crosscut between the No. 2 and No. 3 entries, is clear evidence of a violation of 30 C.F.R. 75.301 in that 9,000 cfm of air was not reaching the last open crosscut in this set of developing entries.

Accordingly, it is found that a violation of 30 C.F.R. 75.301 has been established by a preponderance of the evidence.

C. Negligence of the Operator

The placement and condition of the check curtains was responsible for the low air reading obtained by the inspector (Tr. 25, 29, 71, 77-78, 89). The parties demonstrated substantial disagreement as to whether the placement of the curtains complied with the applicable portions of the approved ventilation system and methane and dust control plan. The drawings on page 12 of the plan depict a typical ventilation system applicable to a mining cycle utilizing 8 entries and one or two continuous miners. The portion of the mine in which the violation occurred had 10 entries. Paragraph 7 on page 9 of the plan states that the "section and face ventilation system (typical for each system of advance and retreat mining) shown will vary in the number of entries, entry and crosscut centers, and crosscut angles."

It appears that the placement of the check curtains did not comply with the provisions of the approved ventilation system and methane and dust control plan. Furthermore, the flexibility afforded by paragraph 7 on page 9 of the plan does not extend so far as to permit the operator to place himself in violation of 30 C.F.R. 75.301.

The inspector did not know whether Consol knew that the check curtain in the No. 2 entry was down (Tr. 37). However, the testimony of Mr. Phares indicates that the placement of the curtains was the responsibility of a section foreman (Tr. 79). It can therefore be concluded that Consol knew or should have known of the existence of one of the conditions principally responsible for the low air reading. Accordingly, it is found that Consol demonstrated ordinary negligence.

D. Gravity of the Violation

Inspector Coffield testified that the violation was serious because methane could accumulate on the left side of the section as a result of the reduced ventilation (Tr. 34-35). An accumulation of methane could figure prominently in a mine explosion (Tr. 37). Mr. Phares testified that the section liberates methane (Tr. 72). According to Inspector Coffield, the mine liberates such quantities of methane that excessive quantities have been detected on the belt lines (Tr. 35). However, it does not appear that Inspector Coffield issued any citations at the time based upon excessive quantities of methane (Tr. 54). The section was basically dry (Tr. 35).

Mr. Phares testified that it was possible that less than 4,600 cfm of ventilation was present in the crosscut between No. 3 and No. 4 entries, and that it was possible that such ventilation was even progressively lower in the crosscut between No. 4 and No. 5 entries (Tr. 88). According to Inspector Coffield, the progressively lower air velocity readings in the last open crosscut between No. 3 and No. 4 entries, and No. 4 and No. 5 entries, would affect the accumulation of methane. The lower the air readings, the more methane would or could

accumulate (Tr. 91-92).

In view of the foregoing, it is found that the violation was serious.

E. Significant and Substantial Criterion

The citation contains the allegation that the violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. In Alabama By-Products Corporation, 7 IBMA 85, 94, 83 I.D. 574, 1976-1977 CCH OSHD par. 21,298 (1976), the Board held that the significant and substantial criterion bars the issuance of citations in "two categories of violations, namely, violations posing no risk of injury at all, that is to say, purely technical violations, and violations posing a source of any injury which has only a remote or speculative chance of coming to fruition." A corollary to this proposition is that a violation of a mandatory standard may be significant and substantial "without regard to the seriousness or gravity of the injury likely to result from the hazard posed by the violation, that is, an inspector need not find a risk of serious bodily harm, let alone death." 7 IBMA at 94.

As noted above, the violation was serious. It was not a purely technical violation. Considering the low air volume reading computed by the inspector, the mine's level of methane liberation, the potential for methane to accumulate, and the well-recognized explosive properties of methane, it cannot be said that the source of injury had only a remote or speculative chance of coming to fruition. Accordingly, it is found that the violation was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

F. Good Faith in Attempting Rapid Abatement

The parties stipulated that Consol abated the violation within the time set by Inspector Coffield and that Consol acted in good faith in doing so (Tr. 5). Accordingly, it is found that Consol demonstrated good faith in attempting rapid abatement.

G. History of Previous Violations

Respondent's history of previous violations at the Shoemaker Mine for which assessments have been paid, beginning November 19, 1977, and ending November 18, 1979, is summarized as follows:

30 C.F.R. Standard	Number of Paid Assessments	Total Amount Paid
All sections	962	$180,851
75.301	1	$122

H. Size of the Operator's Business

The parties stipulated that Consol is a large operator, and that the Shoemaker Mine is a large mine (Tr. 6-7). Specifically, the parties stipulated that size of Consol is rated at 44,855,465

tons of coal per year, and

the size of the Shoemaker Mine is rated at 1,791,721 tons of coal per year (Tr. 11).

I. Effect of a Civil Penalty on the Operator's Ability to Remain in Business

No evidence was presented to establish that the assessment of a civil penalty will affect Consol's ability to remain in business. In Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 CCH OSHD par. 15,380 (1972), the Board held that evidence relating to the issue as to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. Therefore, I find that a penalty otherwise properly assessed in Docket No. WEVA 80-379 will not impair Consol's ability to continue in business.

VI. Conclusions of Law

1. Consolidation Coal Company and its Shoemaker Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to these proceedings.

2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, these proceedings.

3. Federal mine inspector Charles Coffield was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of Citation No. 633821, November 26, 1979, 30 C.F.R. 75.301.

4. The violation charged in Citation No. 633821, November 26, 1979, 30 C.F.R. 75.301, is found to have occurred as alleged.

5. The violation charged in Citation No. 633821, November 26, 1979, 30 C.F.R. 75.301, was of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.

6. All of the conclusions of law set forth in Part V, supra, are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of Law

MSHA and Consol filed posthearing briefs. Consol filed a reply brief. Such briefs, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in these cases.

VIII. Penalty Assessed

Upon consideration of the entire record in these cases and the foregoing findings of fact and conclusions of law, I find that the assessment of a penalty in Docket No. WEVA 80-379 is warranted as follows:

Citation No.	Date	30 C.F.R. Standard	Penalty
633821	11/26/79	75.301	$600

ORDER

Accordingly, IT IS ORDERED that the determination of September 18, 1980, affirming the dismissal of the proposal for a penalty in Docket No. WEVA 80-379 as relates to Citation No. 633657, November 19, 1979, 30 C.F.R. 75.303 be, and hereby is, REAFFIRMED.

IT IS FURTHER ORDERED that the notice of contest in Docket No. WEVA 80-160-R be, and hereby is, DENIED; and that Citation No. 633821, November 26, 1979, 30 C.F.R. 75.301 be, and hereby is, AFFIRMED.

IT IS FURTHER ORDERED that Respondent pay a civil penalty in Docket No. WEVA 80-379 in the amount of $600 within the next 30 days.

John F. Cook
Administrative Law Judge

ÄÄ

~FOOTNOTE_ONE

1 The proposal for a penalty filed in Docket No. WEVA 80-379 also encompassed Citation No. 633657, November 19, 1979, 30 C.F.R. 75.303. Citation No. 633657 was also the subject matter of the notice of contest proceeding in Docket No. WEVA 80-158-R. All matters relating to Citation No. 633657 were disposed of on July 22, 1980, by the granting of various motions in the two cases resulting in the vacation of Citation No. 633657 and the dismissal of the proposal for a penalty insofar as it related to such citation. This disposition was affirmed by an order issued on September 18, 1980.

~FOOTNOTE_TWO

2 See n. 1, supra.

~FOOTNOTE_THREE

3 The five North Face section was a two-miner section. The other miner was mining in one of the entries on the right side of the Five North Face section (Tr. 89).

~FOOTNOTE_FOUR

4 Inspector Coffield and Mr. Phares demonstrated considerable disagreement as relates to the condition of the two

check curtains. Inspector Coffield testified that check curtain No. 1 was loose in a few places around the edges, but that it was basically up and basically sound (Tr. 29, 33-34). He further testified that check curtain No. 2 was almost completely torn down, with approximately two-thirds of it down and the remaining one-third of it up (Tr. 29, 31-33). Mr. Phares testified at one point that Inspector Coffield and he came through curtain No. 2, and that he did not recall it being down (Tr. 72). Similarly, Mr. Phares testified at another point that he did not recall any problem with check curtain No. 1 or check curtain No. 2 (Tr. 83-84).

I accept the inspector's testimony on this point because he affirmatively testified as to the condition of the two check curtains. Mr. Phares testimony that he did not recall check curtain No. 2 being down is not an affirmative statement that the curtain was up. Similarly, his testimony that he did not recall any problem with either curtain is not an affirmative statement that no problems existed.

~FOOTNOTE_FIVE
5 The foundation for Consol's argument that a location in the last open crosscut between the No. 1 and No. 2 entries constitued a valid place for measurement is further without foundation because Consol has not shown any provisions in the ventilation plan which would have authorized any part of the No. 2 entry as an intake air course. The only portions of the ventilation plan which apply to this situation would indicate that there is no foundation for the use of No. 2 entry for intake air.

~FOOTNOTE_SIX
6 Inspector Coffield testified that he had taken methane readings on different occasions and had obtained readings of .8 percent, .9 percent and possibly 1.2 percent. He further testified that methane has been found in excessive quantities even back on the belt lines (Tr. 35).

~FOOTNOTE_SEVEN
7 The most logical and effective method would be to set forth definitions for the terms "intake air course," "return air course," "intake air," and "return air" in Part 75 of Title 30 of the Code of Federal Regulations.